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Affin Bank Bhd v Jamaludin bin Jaafar (The Association of Banks in Malaysia & Anor, interveners)

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-7–02 OF 2017 (K)
AHMAD MAAROP PCA, HASAN LAH, RAMLY ALI, ZAHARAH IBRAHIM AND JEFFREY TAN FCJJ
15 MAY 2019

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Land Law — Malay reservations — Charge in favour of non-Malay — Whether Kedah Malay Reservations Enactment No 63 ('KMRE') did not prohibit Malay reservation land from being charged to non-Malay — Whether such a charge was valid — Whether the words 'no right or interest therein shall vest' in s 6(1) of the KMRE did not mean non-Malay was prohibited from acquiring an interest in Malay reserve land by way of charge — Whether s 6(1) only prohibited non-Malay from acquiring ownership of any Malay reserve land by way of sale or transfer — Whether ejusdem generis rule had to be applied to reading of s 6(1) so that the vesting in non-Malay of any right or interest in Malay reserve land only referred to acquisition of ownership of such land by way of sale or transfer

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The issue in the instant appeal was whether the Kedah Malay Reservations Enactment No 63 ('the KMRE') prohibited a Malay person ('the respondent') from charging his Malay reserve land to a non-Malay entity ('the appellant'). The respondent had provided the charge to secure the appellant's grant of banking facilities to a borrower. The borrower defaulted, causing the appellant to take legal action to recover the monies owing under the facilities. The appellant entered default judgment against the respondent and caused him to be adjudged a bankrupt. The respondent's applications to set aside the default judgment as well as the bankruptcy orders made against him were both dismissed by the High Court resulting in two separate appeals by the respondent to the Court of Appeal ('COA') against those decisions. The instant appeal was against the COA's allowing of both the appeals. In dismissing the respondent's application to set aside the default judgment, the High Court had held that the charge in favour of the appellant was valid because the word 'Malay' in s 2 of the KMRE only referred to a natural person and not to a company such as the appellant; that being a non-natural person, the appellant was neither Malay nor non-Malay and therefore was not caught by s 6 of the KMRE which prohibited the vesting in a non-Malay of any rights or interests in Malay reserve land. To fortify its finding, the High Court noted that Schedule A of the KMRE provided, inter alia, that 'All documents of title except Permits, Banchi Sewa and Surat Akuan may be charged to anyone'. The COA reversed the High Court's decision, holding that s 6 clearly provided that

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'no right or interest (in any Malay Reservation Land) ... shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay ...' and that any document or agreement purporting to cause such vesting was void. The COA held that the fact that the appellant was a non-natural person was irrelevant; that the relevant factor was whether the appellant was categorised as 'Malay' under the Second Schedule of the KMRE for the purposes of the Enactment. Section 19 of the KMRE allowed Kedah's Ruler-in-Council, in his discretion, to declare any person as 'Malay' for the purposes of the KMRE. The COA ruled that the provision in Schedule A of the KMRE that 'All documents of title except Permits, Banchi Sewa and Surat Akuan may be charged to anyone' could not override the substantive provision in s 6 which governed the legality or otherwise of the act of vesting in a non-Malay of any right or interest in any Malay reserve land. The COA concluded that since the appellant was not categorised as a Malay entity under the Second Schedule of the KMRE, it was prohibited by s 6 of the KMRE from holding any right or interest, including as chargee, in the respondent's land.

Held, unanimously allowing the appeal, setting aside the COA's decision and affirming the decisions of the High Court:

(1) There was no express prohibition in s 6 of the KMRE against the creation of a charge over Malay reserve land in favour of a non-Malay. If the legislature had intended to prohibit the creation of such a charge, it would have expressly provided so as was done in s 8 of the Malay Reservations Enactment (FMS Cap 142) which applied to Negeri Sembilan, Pahang, Perak, Selangor and the Federal Territory of Kuala Lumpur; s 9 of the Johor Malay Reservations Enactment No 1 of 1936; s 5A of the Perlis Malay Reservations Enactment No 7 of 1353; s 9 of the Terengganu Malay Reservations Enactment No 17 of 1360 and s 108 of the National Land Code (Penang and Malacca) Titles Act 1963 which applied to Penang and Malacca. Since the KMRE did not prohibit the charging of the respondent's land to the appellant (a non-Malay), the charge was valid (see paras 17–18 & 27).

(2) The words 'no right or interest therein shall vest' in s 6(1) of the KMRE were governed by 'whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise'. The key words which qualified the vesting of the right or interest in a document of title of a Malay reservation land of a Malay to a non-Malay were, vitally, 'transfer' and 'sale'. The general words 'or otherwise' in the aforesaid phrase should be read *ejusdem generis* with the specific words 'transfer, sale in execution of a decree, sale at the instance of a chargee' where the effect was the devolution of proprietorship of the land. Creation of a charge did not involve transfer of the ownership of the land to the chargee. A charge did not vest proprietorship of the land in the chargee. The chargor remained

as proprietor of the land (see paras 19–20).

(3) There was no conflict, as was found by the COA, between the third paragraph in Schedule A of the KMRE and s 6(2) of the same Enactment. The third paragraph of Schedule A was clear. All documents of titles except permits, *banchi sewa* and *surat akuan* may be charged to anyone. There was no prohibition against the charging of documents of title other than the three types of documents specified. The rest of the third paragraph was also clear. If the chargor did not pay the money due, the land, if owned by a Malay, may be sold only to a Malay. The land could not be sold to a non-Malay. The provisions in the third paragraph of Schedule A were therefore consistent with the operation of s 6 of the KMRE and fortified the effect of that section (see paras 21–23).

(4) One of the interveners in this appeal, The Association of Banks in Malaysia, introduced evidence in the form of the notification in the government *gazette* dated 12 January 2017 issued by the State Government of Kedah showing that the Second Schedule to the KMRE, listing the entities declared to be 'Malay', did not exist and that the KMRE had never been amended to include the Second Schedule. Even if the Second Schedule was part of the KMRE, it did not change this court's interpretation on the effect of s 6 of the KMRE or the decision in respect of this appeal (see paras 26–27).

[Bahasa Malaysia summary

Isu dalam rayuan ini adalah sama ada Enakmen Rizab Melayu Kedah No 63 ('ERMK') melarang orang Melayu ('responden') daripada menggadai tanah rizab Melayunya kepada entiti bukan Melayu ('perayu'). Responden telah memberikan gadaian itu untuk menjamin pemberian kemudahan perbankan perayu kepada peminjam. Peminjam telah gagal membayar, menyebaban perayu mengambil tindakan undang-undang untuk mendapat balik wang yang terhutang di bawah kemudahan itu. Perayu telah memasuki penghakiman ingkar terhadap responden dan menyebabkannya diisytihar bankrap. Permohonan perayu untuk mengetepikan penghakiman ingkar dan juga perintah kebankrapan yang dibuat terhadapnya kedua-duanya telah ditolak oleh Mahkamah Tinggi yang mengakibatkan dua rayuan berasingan oleh responden kepada Mahkamah Rayuan (''MR') terhadap keputusan-keputusan tersebut. Rayuan ini adalah terhadap MR yang membenarkan kedua-dua rayuan itu. Dalam menolak permohonan responden untuk mengetepikan penghakiman ingkar, Mahkamah Tinggi telah memutuskan bahawa gadaian yang menyebelahi perayu adalah sah kerana perkataan 'Melayu' dalam s 2 ERMK hanya merujuk kepada orang semula jadi dan bukan syarikat seperti perayu; yang bukan orang semula jadi, perayu bukanlah Melayu atau bukan Melayu dan oleh demikian tidak terikat oleh s 6 ERMK yang melarang pemberian kepada bukan Melayu apa-apa hak atau kepentingan dalam tanah rizab Melayu. Bagi mengukuhkan dapatannya,

Mahkamah Tinggi mengambil perhatian baawa Jadual A ERMK memperuntukkan, antara lain, bahawa 'All documents of title except Permits, Banchi Sewa and Surat Akuan may be charged to anyone'. MR mengakas keputusan Mahkamah Tinggi, dengan memutuskan bahawa s 6 jelas memperuntukkan bahawa 'no right or interest (in any Malay Reservation Land) ... shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay ...' dan bahawa apa-apa dokumen atau perjanjian bagi maksud menyebabkan pemberian tersebut adalah tidak sah. MR memutuskan bahawa fakta yang perayu bukan orang semula jadi adalah tidak relevan; bahawa faktor yang relevan adalah sama ada perayu dikategorikan sebagai 'Melayu' di bawah Jadual Kedua ERMK bagi tujuan Enakmen tersebut. Seksyen 19 ERMK membenarkan Majlis Di-Raja Kedah, dalam budi bicaranya, untuk mengisytiharkan mana-mana orang sebagai 'Melayu' bagi tujuan ERMK. MR memutuskan bahawa peruntukan dalam Jadual A ERMK bahawa 'All documents of title except Permits, Banchi Sewa and Surat Akuan may be charged to anyone' tidak boleh mengatasi peruntukan substantive dalam s 6 yang mengawal kesahan atau sebaliknya tindakan pemberian kepada orang bukan Melayu apa-apa hak atau kepentingan dalam apa-apa tanah rizab Melayu. MR membuat kesimpulan bahawa oleh kerana perayu tidak dikategorikan sebagai entiti Melayu di bawah Jadual Kedua ERMK, ia adalah dilarang oleh s 6 ERMK daripada memegang apa-apa hak atau kepentingan, termasuk sebagai pemegang gadaian, dalam tanah responden.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan MR dan mengesahkan keputusan Mahkamah Tinggi:

(1) Tiada peruntukan larangan yang nyata dalam s 6 ERMK terhadap gadaian yang dibuat ke atas tanah rizab Melayu yang memihak kepada orang bukan Melayu. Sekiranya badan perundangan bertujuan untuk melarang gadaian itu dibuat, ia sepatutnya telah diperuntukkan secara nyata sepertimana dinyatakan dalam s 8 Enakmen Rizab Melayu (FMS Cap 142) yang terpakai di Negeri Sembilan, Pahang, Perak, Selangor dan Wilayah Persekutuan Kuala Lumpur; s 9 Enakmen Rizab Melayu Johor No 1 tahun 1936; s 5A Enakmen Rizab Melayu Perlis No 7 dari 1353; s 9 Enakmen Rizab Melayu Terengganu No 17 dari 1360 dan s 108 Hak Milik Kanun Tanah Negara (Pulau Pinang dan Melaka) 1963 yang digunakan di Pulau Pinang dan Melaka. Oleh kerana ERMK tidak melarang penggadaian tanah responden kepada perayu (orang bukan Melayu), gadaian itu adalah sah (lihat perenggan 17–18 & 27).

(2) Ungkapan 'no right or interest therein shall vest' dalam s 6(1) ERMK dikawal oleh 'whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise' kata kunci yang melayakkan pemberian hak atau kepentingan dalam suatu dokumen hak milik tanah rizab Melayu seorang Melayu kepada orang bukan Melayu adalah, yang

pentingnya, 'transfer' dan 'sale'. Perkataan biasa 'or otherwise' dalam ungakapan terseut patut dibaca *ejusdem generis* dengan perkataan spesifik 'transfer, sale in execution of a decree, sale at the instance of a chargee' di mana kesannya adalah pemindahan pemilikan tanah itu. Gadaian yang dibuat itu tidak melibatkan pemindahan pemilikan tanah kepada pemegang saham. Penggadai tidak memerikan pemilikan tanah kepada pemegang gadaian. Penggadai masih kekal sebagai pemilik tanah (lihat perenggan 19–20).

(3) Tiada konflik, seperti yang didapati oleh MR, antara perenggan ketiga dalam Jadual A ERMK dan s 6(2) Enakmen yang sama. Perenggan ketiga Jadual A adalah jelas. Semua dokumen hak milik kecuali permit, banchi sewa dan surat akuan boleh digadaikan kepada sesiapa sahaja. Tiada larangan untuk menggadaikan dokumen hak milik selain daripada tiga jenis dokumen yang dinyatakan. Selebihnya perenggan ketiga juga adalah jelas. Sekiranya penggadai tidak membayar wang yang terhutang, tanah itu, jika dimiliki oleh seorang Melayu, boleh dijual hanya kepada orang Melayu. Tanah itu tidak boleh dijual kepada orang bukan Melayu. Oleh itu peruntukan dalam perenggan ketiga Jadual A adalah konsisten dengan s 6 ERMK dan mengukuhkan kesan seksyen tersebut (lihat perenggan 21–23).

(4) Salah satu daripada pencelah dalam rayuan ini, Persatuan Bank-Bank di Malaysia, mengemukakan bukti dalam bentuk pemberitahuan dalam *warta* kerajaan bertarikh 12 Januari 2017 yang dikeluarkan oleh Kerajaan Negeri Kedah menunjukkan bahawa Jadual Kedua ERMK, menyenaraikan entiti-entiti yang diisytiharkan sebagai 'Melayu', tidak wujud dan ERMK tidak pernah dipinda untuk memasukkan Jadual Kedua. Walaupun Jadual Kedua adalah sebahagian daripada ERMK, ia tidak mengubah tafsiran mahkamah ini mengenai kesan s 6 ERMK atau keputusan berkenaan rayuan ini (lihat perenggan 26–27).]

Notes

For cases on charge in favour of non-Malay, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4134–4136.

Cases referred to

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590; [2017] 2 ILR 230, FC (refd)

Sime Bank Bhd v Projek Kota Langkawi Sdn Bhd [1998] 4 MLJ 334; [1999] 1 CLJ 307, HC (refd)

Sime Securities Sdn Bhd v Tetuan Projek Kota Langkawi Sdn Bhd [1999] 4 MLJ 585, HC (refd)

Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang —

which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990) [2010] 2 MLJ 155; [2010] 2 CLJ 1, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78(1)
Johor Malay Reservations Enactment No 1 of 1936 s 9
Kedah Malay Reservations Enactment No 63 ss 2, 6, 6(1), (2), 19, Schedule A, para 2, Second Schedule
Malay Reservations Enactment (FMS Cap 142) s 8
National Land Code (Penang and Malacca) Titles Act 1963 s 108
Perlis Malay Reservations Enactment No 7 of 1353 s 5A
Terengganu Malay Reservations Enactment No 17 of 1360 s 9

Appeal from: Civil Appeal No K-02–2728–12 of 2013 (Court of Appeal, Putrajaya)

Chan Kean Li (Edwin Seibel, Lim Poh Leong, Yap Kok Kheong and Ooi Xi Fang with him) (Gibb & Co) for the appellant.
P Latsmanan (Leonard Anselm Gomes, Cheryl Anne Gomes and Danielle Andrea Gomes with him) (Khor Gaik Thiam & Latsmanan) for the respondant.
Yoong Sin Min (Cheah Faan Jin with her) (Shook Lin & Bok) for the first intervener.
Mohd Johan Lee (Mohd Nakhaie bin Ishak with him) (J Lee & Assoc) for the second intervener.
Khairul Fazly bin Kamarudin (Radin Ariff Taquiddin bin Radin Amir with him) (Legal Department, Bank Negara Malaysia) watching brief.

Ahmad Maarop PCA:

[1] These grounds of judgment are prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as Hasan Lah FCJ and Jeffrey Tan Kok Wha FCJ had since retired.

[2] The parties will be referred to as they were in the High Court (Alor Setar High Court Civil Suit No 22–189–06 of 2011).

[3] The case concerns the appeal by the plaintiff against the decision of the Court of Appeal which had, on 14 July 2015, reversed the decision of the High Court in favour of the plaintiff. Leave to appeal was granted to the plaintiff on the following question:

> Whether the Kedah Malay Reservations Enactment No 63 prohibits a Malay Reservation Land owned by a Malay from being charged to any party which is not categorized as a Malay under the Kedah Malay Reservations Enactment No 63?

A **[4]** We heard the appeal on 13 November 2017. We unanimously allowed the plaintiff's appeal with costs. We answered in the negative the question in respect of which the leave to appeal was granted. We set aside the decision of the Court of Appeal.

B **[5]** The following are the reasons for our decision.

[6] The background facts leading to the appeal in this case are these. In 1997, the plaintiff granted banking facilities to the first defendant, Teh Two Kea (trading under the name of Leong Hin Co). To secure the facilities, the second C defendant (Jamaludin bin Jaafar) executed a charge over his land described as GM23135, Lot No 1451, Mukim Langgar, Alor Setar, Kedah ('the land'). The land was Malay reserve land and the second defendant was a Malay. When the first defendant defaulted on the loan, the plaintiff filed a civil action in the Alor D Setar High Court against the first and the second defendants, vide Civil Suit No 22–189–06 of 2011, to recover the sum due on the banking facilities and the interest which accrued thereon. On 16 October 2011, a default judgment was entered against the second defendant whereby the second defendant was ordered to pay the plaintiff a sum of RM998,527.86 with interest at the rate of E 3.5%pa calculated on a monthly basis from 1 April 2012 until full payment. On 16 July 2012, the plaintiff filed a bankruptcy notice against the second defendant, followed by a creditor's petition six months later on 22 January 2013. The second defendant opposed the petition and duly served on the plaintiff his notice of intention to oppose the petition. In the meantime, the F second defendant filed a summons in chambers seeking for an order that the hearing of the creditor's petition be stayed pending disposal of his application to set aside the default judgment. The application was granted by the learned senior assistant registrar ('SAR') on 22 May 2013.

G **[7]** On 27 March 2013, the second defendant filed an application to set aside the default judgment. On 12 September 2013, the learned SAR of the High Court dismissed that application. On 13 November 2013, the learned judicial commissioner of the High Court (Zakiah Kassim JC) dismissed the second defendant's appeal. The second defendant appealed to the Court of Appeal.

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[8] The learned SAR fixed the creditor's petition filed by the plaintiff for hearing on 13 January 2014. Learned counsel for the second defendant applied for postponement of the hearing of the creditor's petition pending the disposal of the second defendant's appeal to the Court of Appeal against the decision of I Zakiah Kassim JC which affirmed the default judgment decision of the learned SAR. Learned counsel for the plaintiff objected to the postponement. The learned SAR proceeded to hear the creditor's petition, at the conclusion of which she made the receiving and adjudication orders ('the ROAO') against the second defendant. The second defendant appealed to the judge in chambers

against that decision but on 11 August 2014 the learned judicial commissioner (Abu Bakar Katar JC) dismissed the application. The second defendant appealed to the Court of Appeal against that decision. Thus, there were then two appeals before the Court of Appeal:

(a) the appeal against the decision of Zakiah Kassim JC on 13 November 2013 affirming the default judgment; and

(b) the appeal against the decision of Abu Bakar Katar JC on 11 August 2014 affirming the ROAO.

[9] The Court of Appeal first dealt with the appeal against the decision of Zakiah Kassim JC because, according to the Court of Appeal, it was first in time, and also because if it were to allow the appeal and set aside the default judgment, the decision of Abu Bakar Katar JC affirming the decision of the learned SAR to issue the ROAO would have to be set aside as a consequence because with the setting aside of the default judgment, the whole substratum of the ROAO on which the decision was based would no longer be in existence.

[10] On 14 July 2015. the Court of Appeal allowed the second defendant's appeal against Zakiah Kassim JC's decision and set aside the default judgment. Consequently, the appeal against Abu Bakar Katar JC's decision was allowed and the ROAO was set aside.

[11] On 16 January 2017, the plaintiff was granted leave to appeal to this court on the question which we have adverted to.

[12] On the same date, this court also allowed the Association of Banks in Malaysia ('the first intervener') and Persatuan Institusi Perbankan Islam Malaysia ('the second intervener') to intervene in the plaintiff's appeal to this court.

IN THE HIGH COURT

[13] In dismissing the second defendant's appeal to the judge in chambers, and affirming the learned SAR's decision in entering judgment in default against the second defendant, Zakiah Kassim JC essentially held that the plaintiff was a company, and not a natural person as defined under s 2 of the Kedah Malay Reservations Enactment No 63 ('the Kedah Malay Reservation Enactment'), and that Schedule A of the Enactment provides that 'All documents of title except permits, *Banchi Sewa*, and *Surat Akuan* may be charged to anyone'. Therefore, the Malay reservation land owned by the second defendant could be charged under the Enactment. The learned JC relied on *Sime Bank Bhd v Projek Kota Langkawi Sdn Bhd* [1998] 4 MLJ 334; [1999] 1 CLJ 307. This is what the learned JC said:

[7] Plaintif dalam kes ini adalah sebuah syarikat yang ditubuhkan di bawah Akta Syarikat 1965 dan bukan 'natural person' di bawah Akta Syarikat dan bukannya 'natural person' yang dimaksudkan di bawah Section 2 Malay Reservation Enactment.

[8] Schedule A dalam Malay Reservation Enactment memperuntukkan bahawa:

> all documents of title except permits, Banchi Sewa, and Surat Akuan may be charged to anyone; ...

[9] Oleh itu tanah rizab Melayu yang dimiliki Perayu boleh digadai di bawah Enakmen Rizab Melayu Kedah.

Dalam kes *Sime Bank Bhd v Projek Kota Langkawi Sdn Bhd* [1998] 4 MLJ 334; [1999] 1 CLJ 307, persoalan timbul samada menurut peruntukan Seksyen 6 Enakmen Rezab Melayu Kedah, tanah rezab Melayu boleh dicagar kepada plaintif yang bukan Melayu bagi maksud Enakmen Rezab Melayu Kedah. Yang Arif Hakim Hishamuddin Yunus telah memutuskan bahawa:

> Under the State of Kedah Malay Reservation Enactment, the plaintiff, although being a company and therefore not a Malay, as defined by the Enactment, is allowed to be a chargee in respect of a Malay reservation land;

IN THE COURT OF APPEAL

[14] In reversing the decision of the High Court, the Court of Appeal held that the operative words in s 6(1) of the Kedah Malay Reservations Enactment are 'no right or interest therein shall vest ... in any person who is not a Malay' which having regard to the legislative scheme of the Kedah Enactment must refer to any act of vesting any right or interest in any Malay reservation land in a non-Malay, including but not limited to 'sale' at the instance of a chargee. As the plaintiff was a non-Malay, the vesting in the plaintiff of interest in the Malay reservation land in question by way of the third party charge was null and void and of no effect. The fact that the plaintiff was a non-natural person was not relevant because under the Kedah Malay Reservations Enactment, a non-natural person such as a commercial bank, a private limited company or even a society could qualify as a Malay. This is what the Court of Appeal said in its judgment:

> [27] In arriving at her decision the learned JC relied heavily on the judgment of Hishamudin Yunus J (as he then was) delivered 17 years ago in *Sime Bank Bhd v Projek Kota Langkawi Sdn Bhd* [1998] 4 MLJ 334; [1999] 1 CLJ 307. Two things must be kept in mind when considering this case. Firstly, the charged land was a Malay reservation land and secondly, the chargee bank (Sime Bank) was a non-Malay within the meaning of s 2 of the Kedah Enactment.
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> [28] The issue in that case, like the issue before us, was whether under s 6 of the Kedah Enactment, a Malay reservation land could be charged to the plaintiff bank, a non-Malay. While acknowledging that the object of the Kedah Enactment was to protect Malay rights by preventing reservation lands from falling into the hands of non-Malays, the learned judge nevertheless went on to hold:

(a) under the State of Kedah Malay Reservation Enactment, the plaintiff, although being a company and therefore not a Malay as defined by the Enactment, is allowed to be a chargee in respect of a Malay reservation land.

[29] From our reading of the judgment, the sheet anchor of the learned judge's reasoning was that since the word 'Malay' in s 2 of the Kedah Enactment only refers to natural persons and not to non-natural persons, the plaintiff bank being a non-natural person was neither Malay nor non-Malay and as such was not caught by s 6 of the Kedah Enactment which prohibits a non-Malay from holding any right or interest in any Malay reservation land. The word 'Malay' is defined by s 2 to mean:

> a person professing the Muslim religion and habitually speaking the Malay language of whose parents one at least is a person of Malayan race or of Arab descent.

[30] The effect of Hishamudin Yunus J's decision is that a Malay reservation land in Kedah could be charged to any non-natural person such as a commercial bank or a licensed 'Along' operating as a private limited company irrespective of whether such non-natural person is a Malay or otherwise within the meaning of s 2 read with the Second Schedule to the Kedah Enactment.

[31] With all due respect to the learned judge, we must say at the outset that we are unable to accept his reasoning as a correct proposition of law. To give s 6 of the Kedah Enactment the construction that the learned judge had given would be to give a construction that would defeat the object of the provision rather than to put its object into effect.

[32] The issue before His Lordship was a straightforward issue of whether any right or interest in any Malay reservation land could vest in a non-Malay. The answer to the question is self evident in s 6 itself, which we reproduce below for ease of reference:

> 6(1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.
>
> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void.

[33] Subsection (2) above is clear and unambiguous, that any document or agreement purporting to vest in a non-Malay any right or interest in any Malay reservation land 'shall be void'. So strict is the prohibition that even an attempt at such act by a Malay is threatened by s 7 with forfeiture of his land, which 'shall thereafter vest in the Sultan absolutely'.

[34] The operative words in sub-s (1) are 'no right or interest therein shall vest ... in any person who is not a Malay' which having regard to the legislative scheme of the

Kedah Enactment must refer to any act of vesting any right or interest in any Malay reservation land in a non-Malay, including but not limited to 'sale' at the instance of a chargee.

[35] As the plaintiff bank in that case was a non-Malay, the vesting in the bank of interest in the Malay reservation land in question by way of the third party charge was therefore null and void and of no effect. The fact that the plaintiff bank was a non-natural person was irrelevant because under the Kedah Enactment a non-natural person such as a commercial bank, a private limited company or even a society could qualify as a Malay.

[36] Even the Malayan Borneo Building Society is a 'Malay' under the Kedah Enactment although obviously it is a not a natural person (see the Second Schedule). The long list of non-natural persons in the Second Schedule dispels any notion that only natural persons can qualify as 'Malay' under the Enactment.

[37] The flaw in the learned judge's reasoning is that it did not read into s 6 the provisions of s 19 read together with the Second Schedule to the Kedah Enactment. If he had, His Lordship would have realised that although Sime Bank, the plaintiff in that case, was a non-natural person, it would have qualified as a 'Malay' under the Enactment had it been declared as a Malay by the Ruler-in-Council pursuant to s 19, which provides as follows:

> 19 Power to declare other person to be Malay.
>
> The Ruler-in-Council may, in his discretion, notwithstanding anything in this Enactment contained, by order in writing declare that any person of race or nationality be deemed to be a Malay for the purposes of this Enactment, and such person shall then be deemed to be included in the term 'Malay' wherever it shall occur in this Enactment or in any amendment or re-enactment thereof.

[38] Thus, the reason why Sime Bank was not a 'Malay' within the meaning of s 2 of the Kedah Enactment was not because it was not a natural person as opined by the learned judge but because it had never been declared as a Malay by the Ruler-in-Council pursuant to s 19. In the circumstances, we are constrained to hold that Sime Bank was decided per incuriam and can no longer be regarded as good law in so far as it ruled that a Malay reservation land could be charged to a non-Malay.

[39] In *RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors* [1980] 1 MLJ 248, a case which the learned judge followed, Syed Agil Barakbah J (as he then was) by way of obiter held the following view at p 251:

> In the second paragraph of the Schedule it is stated that all documents of title except permits, Banchi Sewa and Surat Akuan may be charged to anyone. If the chargor does not pay the money due, the land so charged if owned by a Malay can be sold only to a Malay or a Siamese. In short, subject to what is stated above as regards to sale, the (Kedah) Enactment allows reservation land to be charged to a non-Malay.

[40] The second paragraph of the Schedule that Syed Agil Barakbah J referred to in the above passage is in fact the third paragraph of Schedule A to the Kedah Enactment which reads:

> All documents of title except Permits, Banchi Sewa, and Surat Akuan may be

charged to anyone; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, and if owned by a Siamese may be sold only to a Malay or a Siamese.

[41] There seems to be a conflict between this paragraph and s 6(2) of the Kedah Enactment. This paragraph says that documents of title may be charged to 'anyone' (which necessarily includes a non-Malay) except that the land may be sold only to a Malay if the chargor does not pay the money due, whereas s 6(2) says that the vesting of any such 'right' or 'interest' in a non-Malay 'shall be void'.

[42] The view that we take on this apparent legislative discrepancy is that although Schedule A is part and parcel of the Kedah Enactment and must not therefore be ignored, it cannot override the substantive provision that governs the legality or otherwise of the act of vesting in a non-Malay any right or interest in any Malay reservation land, and that provision is s 6 of the Kedah Enactment. In fact the last paragraph of the Schedule that Syed Agil Barakbah J referred to in *RAP Nathan* contains the following endorsement:

This notice is published for information only and shall not be deemed to vary the provisions of this Enactment. (Emphasis added.)

...

[46] Back to the present appeal, the fact that Affin Bank is a non-Malay is beyond dispute as its name does not appear in the Second Schedule to the Kedah Enactment. There are presently only two banks listed in the Second Schedule, namely Bank Bumiputra Malaysia Bhd and Bank Pertanian Malaysia Bhd. Being not listed in the Second Schedule and therefore a non-Malay, Affin Bank is prohibited by s 6 of the Kedah Enactment from holding any right or interest, including as chargee, in the Malay reservation land that had been charged to it by the appellant.

OUR DECISION

[15] The sole question in respect of which the leave to appeal was given, brings into focus the effect of the provisions of s 6 of the Kedah Malay Reservations Enactment. This necessarily involves the exercise of the function of a court in construing a statute. Reiterating this function, in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 2 ILR 230, this court said:

[52] The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is. And this is primarily done by reference to the words used in the provision. *Craiese on Legislation* (9th Ed, 2008) at p 611 states:

The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the court is to interpret legislation 'according to the intent of them that made it' and that intent is to be deduced from the language used.

[16] Section 6 of the Kedah Malay Reservations Enactment provides:

> 6(1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, *no right or interest therein shall vest*, whether by *transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise*, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.
>
> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void. (Emphasis added.)

[17] In our view, under s 6, it is clear that sale at the instance of a chargee is prohibited, but there is nothing thereunder which prohibits the creation of a charge of a Malay reservation land owned by a Malay to a non-Malay. In other words, under the Kedah Malay Reservations Enactment, there is no express prohibition against the creation of a charge over Malay reserve land in favour of non-Malays. That, in our view, is deliberate. If the legislature had intended to prohibit the creation of such a charge, it would have expressly provided so.

[18] In this regard, as a matter of comparison, Malay Reservation Enactments in West Malaysia (other than the State of Kelantan) provide for express provisions which prohibit the charging of Malay reservation land to non-Malays. The relevant comparable provisions are as follows:

(a) s 8 of the Malay Reservations Enactment (FMS Cap 142), which is applicable to the States of Negeri Sembilan, Pahang, Perak, Selangor and the Federal Territory of Kuala Lumpur provides:

> 8 Restriction as to transfers, charges and leases
>
> (i) Subject to the provisions of sub-section (11) and of sections 16 and 17 no Malay holding shall be transferred, *charged* or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, *charge* or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles.

(b) s 9 in the Johor Malay Reservations Enactment No 1 of 1936 provides:

> 9 Restriction as to transfers, charges and leases
>
> (i) Subject to the provisions of sub-section (ii) and of sections 17 and 18 no Malay holding shall be transferred, *charged,* leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, *charge* or lease in contravention of this section shall be capable of registration in any Land Office.

(c) s 5A of the Perlis Malay Reservations Enactment No 7 of 1353 provides:

5A Restriction of dealings in Reservation Land

(i) Save as hereinafter provided in this Enactment, no Reservation Land held under a document of title by any Malay shall be mortgaged, *charged* or leased to any person who is not a Malay and no Reservation Land held under a document of title by any Siamese shall be mortgaged, *charged* or leased to any person who is not either a Malay or a Siamese.

(d) s 9 of the Terengganu Malay Reservations Enactment No 17 of 1360 provides:

9 Restriction as to transfers, charges and leases

(i) Subject to the provisions of sub-section (ii) and (iii) of this section and of sections 11 and 19, no Malay holding shall be transferred, *charged*, leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, *charge*, or lease in contravention of this section or any other sections in this Enactment shall be capable of registration in any Land Office or Registry of Titles.

(e) s 108 of the National Land Code (Penang and Malacca) Titles Act 1963, which is applicable in the states of Penang and Malacca provides:

108 Limitation

(1) Subject to Chapter 3, the following provisions shall apply to land subject to this Part —

(f) no such land may at any time be transferred, leased, transmitted or *charged* to any person other than a Malay. For this purpose 'lease' does not include a tenancy for a term not exceeding three years or a lease for a term exceeding three years but not exceeding thirty years;

[19] The reasoning of the Court of Appeal in its construction of s 6(1) of the Kedah Malay Reservations Enactment is that the operative words thereunder are 'no right or interest therein shall vest ... in any person who is not a Malay'. It then said that having regard to the legislative scheme of the Kedah Enactment, those words must refer to any act of vesting of any right or interest in any Malay reservation land to a non-Malay which includes but is not limited to 'sale' at the instance of a chargee. That expansive construction includes the vesting in the plaintiff of interest in the Malay reservation land in question by a third party charge which the Court of Appeal held to be null and void and of no effect. With respect, for reasons which we will give shortly, we are unable to agree. The words 'no right or interest therein shall vest' are governed by 'whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise'. The key words which qualify the vesting of the right or interest in a document of title of a Malay reservation land of a Malay to a non-Malay, are vitally, 'transfer' and 'sale'. The general words 'or otherwise' in the phrase 'no right or interest therein shall vest, whether by transfer, or sale in

execution of a decree, sale at the instance of a chargee or otherwise', should be read *ejusdem generis* with the specific words 'transfer, sale in execution of a decree, sale at the instance of a chargee', where the effect is the devolution of proprietorship of the land. In *Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang — which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990)* [2010] 2 MLJ 155; [2010] 2 CLJ 1, Augustine Paul FCJ speaking for this court said:

> [55] ... My view is that since these preceding words are general words which follow particular and specific words of one genus then it is presumed to be restricted to the same genus as the particular words. Meaning: the general expression is to be read as comprehending things of the same kind as that designated by the preceding particular expression unless there is something to show that a wider sense was intended — see *Public Prosecutor v Pengurus Hong Trading & Co* [1985] 1 MLJ 366 at p 367:
>
> > I am further of the view that the words 'other matter' found in reg 3(v)(ii) of the regulation should be read *ejusdem generis* with 'Prussian blue, lead or compounds of lead' which according to the Deputy Public Prosecutor are poisonous or deleterious to the human body. According to a well established rule of construction of statutes, general terms following particular ones apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the legislature. In other words the general expression is to be read as comprehending things of the same kind as that designated by the preceding particular expressions, unless there is something to show that a wider sense was intended.

[20] Creation of a charge does not involve transfer of the ownership of the land to the chargee. A charge does not vest proprietorship of the land in the chargee. The chargor remains the proprietor of the land. In this regard, the question whether a charge of Malay reservation land created in favour of a non-Malay contravened the Kedah Malay Reservation Enactment was considered by the High Court in *Sime Securities Sdn Bhd v Tetuan Projek Kota Langkawi Sdn Bhd* [1999] 4 MLJ 585. In his judgment, Alauddin J (later PCA) said:

> Does the charge in favour of the plaintiff contravene the Kedah Malay Reservations Enactment No 63 ('the KMRE') and is therefore null and void.
>
> Upon perusal of the provisions of the KMRE, I would agree with learned counsel for the plaintiff that there is no express prohibition against the creation of a charge over Malay reserve land in favour of non-Malays in the KMRE.
>
> Section 6 of the KMRE reads as follows:
>
> > Save as hereinafter provided in this Enactment where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where anywhere any

reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.

I would observe that the prohibition pursuant to s 6(1) is applicable only restrictively in two respects, namely:

(i) *it prohibits the vesting of any right or interest in a non-Malay which arises by reason of transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise*.

(ii) *the words 'or otherwise' means transactions of similar nature like 'transfer' and 'sale' where the consequence is a total devolution of interest in the property. The words 'or otherwise' should therefore be read 'ejusdem generis with 'transfer', 'sale in execution of a decree' and 'sale at the instance of a chargee'*.

Section 8 of the KMRE provides thus:

No State land included in a Malay Reservation shall be sold, leased, or otherwise disposed of to any person who is not either —

a Malay, or

a Siamese certified by the Director in writing to be a Siamese agriculturist permanently resident in the state.

Section 8(1) does not prohibit creation of 'charges' over Malay Reservation land in favour of a non-Malay. What is restricted by statute here is only that such land shall not '... be sold, leased or otherwise disposed of ...'. A 'disposal' will only arise upon a sale of the charged land upon default and by s 6(1) of the KMRE, there is sufficient safeguard that a purchaser at such a sale must be a 'Malay'. Again, the words 'otherwise disposed of' should be read *ejusdem generis* with the words — 'sold' and 'leased'. 'Sold' and 'leased' denoted situation where enjoyment of land is parted to another person. Such parting of the enjoyment of the land does not occur in a 'charge' situation.

Sections 6 and 8 of the KMRE if read together is consistent with and supports the argument of the plaintiff that a charge over a Malay reservation land in favour of a non-Malays is not prohibited under the KMRE. However upon a sale of such land, the purchaser must be a Malay.

Further, the position in Kedah, allowing creation of charges over Malay Reserve Lands even in favour of non-Malays *is confirmed* by the words used in Schedule A — Notice under the KMRE (issued under s 12 of the KMRE). Paragraph 3 reads:

All documents of title except Permits, Banchi Sewa, and Surat Akaun may be charged to anyone; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, and if owned by Siamese may be sold only to a Malay or a Siamese.

Nothing can be more express and direct than these words to allow a charge over Malay reservation land in favour of a non-Malay in Kedah.

[21] In paras 41–42 of its judgment (which we have reproduced above), the Court of Appeal said that there seems to be a conflict between second paragraph in Schedule A to the Kedah Malay Reservation Enactment and s 6(2) of the Enactment.

[22] We disagree. Schedule A is as follows:

MALAY RESERVATIONS
STATE OF KEDAH
SCHEDULE A
ENACTMENT NO 63 (MALAY RESERVATIONS)

Notice is hereby given that all the land situate ..... has, by Notification No ..... dated the ..... day of ..... 13 ..... been included in a Malay Reservation.

From the said date no land owned by a Malay may be transferred to any person who is not a Malay, and no land owned by a Siamese may be transferred to a person who is not either a Malay or a Siamese.

All documents of title except Permits, Banchi Sewa, and Surat Akuan may be charged to anyone; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, and if owned by a Siamese may be sold only to a Malay or a Siamese.

A lease may be granted by the owner to any person for a period of not more than three years, provided that bendang land under ten relongs may not be leased by a Malay to any person other than a Malay or by a Siamese to any person other than a Malay or a Siamese without the consent of the Land Officer.

If any person has before the ..... day of ..... arranged to sell his land to a person who is forbidden by this Enactment to purchase it or if he suffers any immediate material financial loss by the inclusion of his land in a Malay Reservation he may send a petition to the Ruler-in-Council who will decide finally.

All persons who own land in the said Malay Reservation should bring their titles to the Land Officer so that he may mark them 'Malay Reservation'. No fee and no payment has to be made for this.

This notice is published for information only and shall not be deemed to vary the provisions of this Enactment.

Dated at ..... this ..... day of ..... 13.....

Seal

.....

Land Officer

[23] The provisions of the third paragraph of Schedule A are clear. All documents of titles except permits, *banchi sewa* and *surat akuan* may be charged to anyone. There is no prohibition against the charging of document

of titles other than the three types of documents specified therein. The rest of the provisions of the third paragraph is also clear. If the chargor does not pay the money due, the land, if owned by a Malay, may be sold only to a Malay. In other words, land cannot be sold to a non-Malay. In our view, the provisions in the third paragraph of Schedule A are consistent with the operation of s 6 of the Kedah Malay Reservations Enactment. Indeed they fortify the effect of that section as we have construed it (see also Alauddin J's judgment in *Sime Securities v Tetuan Projek Kota*). To reiterate, the section prohibits the sale of the land at the instance of the chargee, but it does not prohibit the creation of a charge of a Malay reservation land to a non-Malay.

[24] The Court of Appeal also said that there were flaws in the learned High Court judge's reasoning in the *Sime Bank* case relied upon by Zakiah Kasim JC in that he did not read s 19 together with the Second Schedule to the Kedah Malay Reservations Enactment. We have reproduced in para 14 above that part of the Court of Appeal's judgment as contained in paras 37–38 of the judgment.

[25] The Second Schedule purported to be the Schedule listing the entities declared to be 'Malay' under s 19 of the Enactment.

[26] In this regard, on 15 August 2017, this court allowed the first intervener to introduce, for the purpose of the appeal before this court, evidence in the form of the notification in the government *gazette* dated 12 January 2017 issued by the state government of Kedah that the Second Schedule to the Kedah Malay Reservations Enactment listing the entites declared as 'Malay' does not exist, and that the Kedah Enactment had never been amended to include the Second Schedule.

[27] In our view, even if the Second Schedule is part of the Kedah Malay Reservations Enactment, it does not change our interpretation on the effect of s 6 of the Enactment, and our decision on the appeal. Section 19 of the Enactment gives power to the Ruler-in-Council in Kedah by order in writing to declare any entity to be a Malay for the purpose of the Enactment. The plaintiff had not been so declared. It was therefore a non-Malay for the purpose of the Enactment. However, since for reasons which we have explained, the Kedah Malay Reservations Enactment did not prohibit the charging of the second defendant's land to the plaintiff (a non-Malay), the charge was valid.

[28] For reasons which we have given, we answered the question in respect of which the leave to appeal was granted, in the negative.

[29] In the result, we allowed the plaintiff's appeal. The decision of the Court of Appeal was set aside. The order of Zakiah Kassim JC dated 13 November 2013 was affirmed. The order of Abu Bakar Katar JC dated 11 August 2014 was affirmed.

[30] We ordered costs of RM10,000 to the plaintiff, and costs of RM10,000 to each intervener. Costs were subject to the payment of allocator fees. We ordered the deposit to be refunded.

[31] Zaharah Ibrahim FCJ and Ramly Ali FCJ had expressed their agreement with these grounds of judgment.

Appeal unanimously allowed; Court of Appeal's decision set aside; decision of High Court affirmed.

Reported by Ashok Kumar